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No. 90-1369

In The

Supreme Court of the United States

October Term, 1990

AMCA INTERNATIONAL FINANCE COMPANY, et al.,

Petitioners,

v.

STEVEN K. HILGEDICK, et al.,

Respondents.

Petition For A Writ Of Certiorari To The California Court Of Appeal, First Appellate District

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Steven K. Hilgedick, Pacific Manufacturing and Hilgedick Rentals, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the California Court of Appeal opinion in this case. The opinion is unreported but appears as Appendix A to the Petition.

STATEMENT OF THE CASE

For six years after college, respondent Steve Hilgedick sold heavy construction equipment in Oregon, invested his commissions and, in 1972, with $60,000 in savings, bought 70% of the Pacific Trencher Company in

Hayward, California. Pacific Trencher dealt in replacement parts for trenchers (large excavators) and, in the year before Hilgedick bought it, had gross sales of $300,000 and 6 employees. By 1979, Pacific Trencher's gross sales were $10,700,000, it had about 70 employees, and its primary business was used construction equipment sales. RT 25-34, 105-106 82; II RT 692-693.[1]

After acquiring Pacific Trencher, Hilgedick started two allied businesses, respondents Pacific Manufacturing and Hilgedick Rental. Pacific Manufacturing, among other things, manufactured trenchers, designed by Hilgedick, which were sold to Pacific Trencher for retail. By 1978, Pacific Manufacturing's gross sales were $1,000,000. The next year Pacific Manufacturing entered into a new field, sales to the government. This was during the period when the federal government was planning to build 5,000 miles of tunnels for underground placement of the MX missile. Pacific Manufacturing designed a trencher and a concrete machine that was to line the MX trenches. Pacific Manufacturing's initial successful bid was for a contract of $1,300,000. RT 40-42, 86-87, 103.

This experience opened new vistas to Hilgedick. Pacific Trencher was, of course, vulnerable to normal business cycles. The federal government, however, is not vulnerable to the cycle, and manufacturing products for the federal government would tide the allied businesses over during a period of downturn. II RT 757. Hilgedick hired a new general manager for Pacific Manufacturing

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[1] "RT" refers to the Reporter's Transcript of the first trial; "II RT" means Reporter's Transcript of the second trial; "CT" means Clerk's Transcript; "Petition" means Petition for Writ of Certiorari; "Supplement" means Petitioners' Supplemental Brief Pursuant to Supreme Court Rule 15.7.

who was experienced in governmental contracts. II RT 757-758, 938-940. Shortly, Pacific Manufacturing was the successful bidder on a $3.9 million Navy contract. II RT 940-941, 785. Pacific Manufacturing also began subcontracting for companies including Westinghouse Electric and Lockheed. II RT 941-942. In order for Pacific Manufacturing successfully to bid on government contracts, it was essential that Pacific Trencher provide a performance guarantee, which it did. II RT 783, 944.

The other allied business, Hilgedick Rental, bought equipment and made it available to Pacific Trencher for rental purposes. RT 30, 44-45. By 1978, Hilgedick Rental had an annual volume of sales in the neighborhood of $1 million. RT 85.

In 1977, Hilgedick had been approached by petitioners, the Koehring group, who wanted him to carry cranes. Hilgedick, who was in the dirt business, not the lifting business, agreed to carry the cranes on condition he also carry Koehring's large excavator and backhoe lines. The dealership agreements were executed in January of 1978. RT 54-56, 67. It was understood by all parties that Pacific Trencher would have to grow, over a number of years, in order properly to handle the Koehring line, and, after the dealership agreements were executed, Hilgedick found larger quarters for his business and multiplied the number of employees. Hilgedick financed this growth with personal loans, bank credit lines, and the form of credit from Koehring known as "flooring", where the title to the machinery passes from the manufacturer to the distributor at the time when the machinery arrives but payment is not immediately due to the manufacturer. RT 64, 77, 82-85, 111-112; II RT 739, 746.

1979 and its gross of almost $11 million was an excellent year for Pacific Trencher. There was, nevertheless, bad news. The bank officer at United California

Bank who had been handling Pacific Trencher's account left and was replaced by a new executive who concluded that Trencher's net worth to debt ratio was out of line. RT 114-116; II RT 781-784. Although both Hilgedick and Koehring agreed that the new bank officer simply did not understand the debt-to-net worth ratio in the construction equipment industry (RT 145) and that there was no reason for UCB to call the loan (II RT 821), explanation about the large price of such items fell on deaf ears (RT 116) and UCB lowered Pacific Trencher's line of credit, cutting cash flow and making it impossible for Trencher to pay its bills. RT 116-122, 303.

By February of 1980, Hilgedick had received commitments from lending institutions to provide him with sufficient funds to pay off his debt to UCB and continue his business. RT 129-133, 138-139, II RT 801-802. Then Koehring's credit manager, Clarence Miller, and Finance President, Ray Lackenbauer, arrived in town, reviewed Pacific Trencher's books, criticized the proposed financing as too expensive and offered to talk with UCB, which, they said, seemed to have a problem understanding the way a business such as Trencher's was conducted. RT 139-145. And Koehring said that it would like to loan money to Pacific Trencher. RT 141; II RT 821. A few months earlier, when UCB called its loan, Pacific Trencher had owed UCB $1.5 million. RT 138-139. By March, UCB was owed only $386,000. II RT 824. In a matter of months, Pacific Trencher had been able to pay UCB well over $1 million, but its other creditors, including Koehring, had not been paid. Most of the major creditors had agreed to a 3-month payment moratorium. RT 123-124. Koehring, during the February meeting, asked Pacific Trencher to accept a $1 million loan and Hilgedick was given the impression that this money was to be used to pay off the

obligation to UCB with the balance to be used for operating capital. There was no discussion of paying, from the loan, the money owed to Koehring for "flooring". RT 146-147.

The loan papers were signed in March. It took two hours to sign all of the documents. Included were personal guarantees of everything owned by Hilgedick and a pledge of Hilgedick's Pacific Trencher stock as collateral for the loan. RT 149-151, 162-163; II RT 828. Pacific Trencher's assets at this time were $5.7 million. II RT 827. Despite the problems with UCB, Pacific Trencher had been profitable in December, January, February and March, the slow season for sales in the construction equipment business. RT 163.

The specifics of the loan agreement provided for the paying off of money owed to UCB and, additionally, the paying off of all money owed to all divisions of Koehring. RT 165. This meant that, of the $1 million, Hilgedick received only about $300,000; his accounts payable at that time were in the range of $700,000. II RT 830. Lackenbauer, an accountant of considerable talent (II RT 1565-1575), had calculated that Pacific Trencher, in order to be sound, actually needed a loan of about $1.4 million. II RT 1607. He did not, however, communicate his opinion to Hilgedick. II RT 1908.

The month after the loan agreement was executed, Koehring terminated, without warning, Pacific Trencher's crane distributorship and transferred it to Trencher's competitor, North American Equipment. The reason given for cancelling the distributorship was Pacific Trencher's "financial condition." RT 167; II RT 831-833.

The loan agreement gave Koehring great power to influence the direction of Pacific Trencher's business, and the character of that business was now altered dramatically. Until the Koehring loan, Pacific Trencher had been, primarily, a used equipment seller with gross sales of

over $5.5 million in used equipment the previous year. RT 106. The sale of large items of used equipment had to be individually financed. Pacific Trencher would have a buyer go out and find the equipment, purchase the equipment on credit, and then sell it to the buyer. The institution usually used to finance the brokering was Credit Alliance. According to Fred Wolford, who as in charge of Credit Alliance in the western states (II RT 1036), Hilgedick was a marvel at locating used equipment, finding a customer who wanted the equipment, and then brokering the exchange. II RT 1038-1039. The loan agreement between Pacific Trencher and Koehring gave Koehring the power to veto any financing for Trencher; Miller vetoed any brokerage financing from Credit Alliance. RT 170. Although the loan agreement between Pacific Trencher and Koehring provided that Koehring, itself, could assist in brokerage financing and though Lackenbauer, at the time of the loan, had emphasized this provision as applying to used-equipment sales (II RT 1909), Koehring refused to do so. On two occasions in the summer of 1980, no-risk brokerage opportunities of $1 million each were available to Pacific Trencher, but Koehring refused to provide the brokerage financing and would permit no one else to do so. Hilgedick had to let his top salesman go, a salesman who had been generating $2-3 million in used sales. RT 170-171; II RT 835-837, 976-978. Manifestly, Koehring was transforming Pacific Trencher from a primarily used equipment dealer to a new (Koehring) equipment dealer.

During the summer of 1980, Miller and Lackenbauer made numerous visits to review the books of Pacific Trencher and a new controller was hired at the direction of Lackenbauer. RT 322-323, 328; II RT 974. The accounting staff was doubled and stayed in telephonic contact with Koehring on a twice daily basis. II RT 974. With sales

of used equipment now reduced to a trickle, cash became dear. II RT 842. In order to raise cash during that summer of 1980, Pacific Trencher entered into negotiations to sell its Los Angeles assets. Miller wanted the assets sold and the proceeds used to pay Trencher's bills. RT 174-175. For the sale to be consummated, it was necessary for Koehring to release its security interest in the Los Angeles assets. To do that, Koehring had to file with the California Secretary of State a release of the security interest represented by its UCC-1 filings.

A "UCC-1 filing" is the filing by which a secured interest in collateral is established. A UCC-1 is "notice" security. A potential creditor has the opportunity to discover what secured interests precede him before extending credit. When there are disputes between or among secured creditors, the UCC-1 with the earlier date takes precedence unless there has been agreement by the earlier creditor to "subordinate" its interest. Koehring, when it extended the $1 million loan to Pacific Trencher, sought subordination from Trencher's creditors and received it from all but Credit Alliance. Credit Alliance was owed about $250,000, Pacific Trencher had assets of $5.7 million, so Koehring was secured by assets worth over $5.6 million. II RT 827; RT 318-320. Release of security is controlled by California Commercial Code § 9405 and may be partial or total. Koehring needed only to file a partial release of its UCC-1 security in Pacific Trencher, to wit: a release limited to the Los Angeles assets. But instead of filing a partial release of its UCC-1 security interest, Koehring, apparently through inadvertence, filed a total release of all its interest in Pacific Trencher The total release was filed with the California Secretary of State in September and, as of September, 1980, Koehring

had no security interest in any of the assets of Pacific Trencher. CT 843, RT 338-340, II RT 1822-23.

Koehring was now bare. It revealed its distress to no one. II RT 1827-1828, 1833-1836. Instead it decided to take over Pacific Trencher, milk the assets in which it was no longer secured and destroy Hilgedick before he could discover the situation.

On October 6, 1980, Koehring's representatives, without any prior warning (II RT 1649) appeared in Hilgedick's office, told him the debt was being accelerated and the Koehring was assuming control pursuant to the stock pledge. RT 178-80. At the time, Pacific Trencher was about $27,000 delinquent on interest due on the loan (II RT 906) and other money was owed pursuant to flooring. II RT 906-907. Koehring claimed it was taking over because of tardy payment but the reason rang hollow; Hilgedick had just sold his Los Angeles assets to satisfy Koehring and Koehring, which was functionally in charge of Pacific Trencher's books, had not previously demanded the money. At trial, Koehring maintained that the real reason why it had taken over Trencher was that the books were in bad shape (see II RT 1651-1652) but, since Koehring had been controlling the books, that justification sounded mighty peculiar too, especially when it had not been mentioned at the time of takeover.

Koehring elected its own board of directors, fired Hilgedick as president of the corporation, and installed as president Ron Mullins, who had just been hired by Koehring (RT 181; II RT 1373-1374) and had no experience running a business (RT 183; II RT 142, 664). Mullins's background was in financing and he took over collection of the accounts receivable. RT 362. Mullins's principal mission was to "collect what's out there as quickly as we can." II RT 1459. And he had one other assignment. As Lackenbauer explained it: "We wanted to make sure that

Pacific Trencher did not make payments to the affiliated companies, to Hilgedick Rental, to Pacific Manufacturing, or indeed repay any of the loans that Mr. Hilgedick had made to Pacific Trencher." II RT 1650. Steve Hilgedick was placed in charge of sales. RT 360; II RT 1639, 1646. All monies collected from the sale of a Koehring product were sent to Koehring. The entire amount went to Koehring no matter the amount actually owed by Trencher to Koehring on the particular machine. The amount sent to Koehring at times included the California sales tax collected from the consumer. RT 188-189, see also RT 360-361, 406.

While Mullins collected on the accounts receivable as quickly as he could, Hilgedick was induced to sell Koehring's product. Koehring controlled Pacific Trencher for about six months and, by the end of that time, Hilgedick had sold all of the more than $1.5 million in Koehring inventory. II RT 883. He did so from the hope that he would eventually regain control of his company which, moreover, owed him $450,000. RT 544. Hilgedick's expectations were misleadingly stimulated by Lackenbauer who falsely assured Hilgedick, from the start of the takeover, the Koehring had assumed control only to "help" him and had no intention of liquidating the business. RT 186, 189-190; II RT 832, 856, 869.

On December 9, 1980, Hilgedick wrote to Lackenbauer stating that he was revoking his personal guarantees. RT 189-90. Koehring's response was two-fold: (a) Koehring secretly attempted to reinstate its UCC-1 filing and, (b) Koehring urged Hilgedick to reinstate his guarantees. RT 190-191, 340-342, 366. Hilgedick refused unless his Pacific Trencher stock were returned to him. RT 199. Hilgedick also decided to seek financing to pay the Koehring debt. Hilgedick approached Howard Pickle, manager of the San Leandro Bank of America. Pickle

reviewed Pacific Trencher's financial statements and informed Hilgedick that the bank would loan enough money to pay the Koehring debt and give Trencher some operating capital. II RT 988. Janet O'Hanis, who was the office manager of Pacific Trencher (II RT 970), had accompanied Hilgedick to the bank, and when they returned to Pacific Trencher, she informed Ron Mullins about the deal. Mullins was furious. He told Hilgedick that Hilgedick had no authority to negotiate a loan and that "Tnis isn't your company, anymore." Mullins went to the phone and called Koehring. II RT 989. The next day, Bank of America withdrew its loan offer. II RT 987-990.

Although Lackenbauer was assuring Hilgedick that Koehring had no intention of liquidating Pacific Trencher, Lackenbauer, on December 22, 1980, sent a letter to his superior, Twombly (Koehring had been acquired by AMCA, II RT 1874-1984), stating that "the final decision to liquidate the distributorship will be made in January, pending audited financial statements and, more importantly, the finding of an alternative distribution." RT 365-366.

During this period, while falsely denying any intention to liquidate Pacific Trencher, Lackenbauer continually led Hilgedick to believe that Koehring was contemplating loaning further money to Pacific Trencher in order to insure its viability. As late as February of 1981, Lackenbauer, speaking at a Pacific Trencher corporate Board of Directors meeting, insisted that the "major impediment" to Koehring's extending further credit to Pacific Trencher was Hilgedick's refusal to reinstate his guarantees. RT 372; and see II RT 985-986.

During the latter fall and winter of 1980-1981, the business ventures allied with Pacific trencher, and Hilgedick himself, had their cash cut off. Pursuant to petitioners' directions, Pacific Trencher stopped paying

rend owed to Hilgedick on the property occupied by Pacific Trencher. Hilgedick Rentals was only paid money due it to the extent payments were necessary to keep machines from being repossessed by other creditors. No money was paid to Pacific Manufacturing for the trenchers that had been sold to Pacific Trencher. RT 184; 207, 211; 346-348; 439-441. Hilgedick was not paid his salary (RT 212), the only employee not being paid, nor was he paid commission on the equipment he was selling. II RT 877-879.

Pacific Manufacturing found itself undermined in its relationship with the Navy. It was low bidder on a $2.5 million Navy contract (RT 196; II RT 863) as well as a $4 million Navy contract with a 100% option, making it worth $7.7 million (RT 433; II RT 863); but the Navy, which had somehow discovered that the stock in Pacific Trencher had changed hands, wanted a reaffirmation of the guarantee from Trencher. The guarantee was simply a performance guarantee and required no pledge of collateral. RT 431, II RT 783. Though Lackenbauer was insisting that he had no intention of liquidating Pacific Trencher, he refused to permit Trencher to reaffirm the guarantee. This was so although Hilgedick offered to assign the contract to Koehring so that Koehring could take 10 percent of the contract from the top to pay off the debt. RT 192-193; II RT 865-866, 944, 986. Lackenbauer refused, giving no reason for his refusal. RT 192-196.

On April 14, 1981, when Hilgedick had sold all of Koehring's new product inventory, it was announced that Pacific Trencher's Koehring dealership was being suspended. RT 381. All parties agreed that there was no way, at this point, for Pacific Trencher to survive without the Koehring distributorship. RT 202-203, 522.

On April 15, 1981, no rent having been paid by Pacific Trencher to Hilgedick, Hilgedick served Pacific

Trencher with a 3-day notice to pay rent or quit. RT 203-204. The Koehring-controlled Pacific Trencher quit the premises in an utterly destructive manner. They fired all the employees and then hired three of the just-fired employees to move out equipment. II RT 936. Predictably, devastation followed. Theft and vandalism were rampant. Mullins was asked to control the situation but Mullins did not care about it. The destruction went on for three days with the doors unlocked at night. II RT 996-998. Trencher's ledgers disappeared (II RT 911, 1915), and, on April 22, 1981, petitioners put Trencher into bankruptcy. RT 389.

During the scene of destruction at Pacific Trencher, Miller delivered what has, so far, been a prophetic threat: "You know," Miller told Hilgedick, "you are never going to be able to afford this lawsuit." II RT 912. Earlier, Miller had said that Hilgedick would find himself in a legal battle he could not win and he would lose everything. II RT 994-995. Miller began to make his point rather vividly. In December of 1981, Hilgedick was served with a notice of default and election to sell under a deed of trust, signed by Miller, and claiming that Hilgedick owed Koehring $2.25 million. II RT 913-914. Hilgedick has no idea where the figure came from and Koehring has never explained it. II RT 914-915.

All of the businesses allied with Pacific Trencher were devastated and ultimately destroyed. Koehring put liens on Hilgedick's property, making it impossible for him to sell any property to generate cash. II RT 920-922. As to Pacific Manufacturing, there were no government contracts. Pacific Manufacturing was low-bidder on a $10 million contract but did not get it. II RT 918. Lockheed withdrew its business. II RT 918-919. Pacific Manufacturing closed its doors. II RT 923, 955. Hilgedick's competitors began using his patented patterns and forms to

make trenchers (II RT 924) but there was little he could do about it. Hilgedick Rental went out of business (II RT 924) and Hilgedick had to file a personal bankruptcy because of petitioners' liens on his property. II RT 921, 925-926.

Respondents' complaint, stating causes of action for, among other things, intentional interference with business relations and breach of contract, was filed in the Superior Court, Alameda County, State of California, on November 11, 1981. CT 2. No cross-complaint was filed by petitioners. Jury trial began on December 15, 1983. RT 9. On December 22, 1982, pursuant to stipulation of the parties, jury trial was waived on respondents' cause of action for breach of contract and the only cause of action submitted to the jury was that for intentional interference with business relations. RT 591-592. Pursuant to stipulation of the parties, the submission to the jury on the issue of damages was bifurcated, the jury being instructed, at first, on the issue of compensatory damages only. RT 597-598. On December 27, 1982, the jury returned its verdict in favor of respondents in the amount of $730,482.10 CT 753. The court then excused the jury but was reminded by respondents' counsel that there was still an issue to consider, at which time the court told the jury that it was not excused and that it had another issue it would have to consider. RT 683. The parties then stipulated to petitioners' net worth and also agreed that there would be neither evidence nor argument on the issue of exemplary damages, the jury simply to be instructed on the law of exemplary damages. The jury was given that instruction and returned a verdict in respondents' favor in the amount of $730,482.10, exactly replicating the amount of compensatory damages. CT 754.

On February 7, 1983, Judge Sutter, the judge to whom the breach of contract cause of action had been submitted

by stipulation, issued his tentative decision denying respondents relief. CT 879. Judge Sutter also made a ruling on a matter which had not been submitted to him and upon which no claim had been made. Judge Sutter found that respondents had injured petitioners and awarded petitioners damages in the amount of $1,986,000. CT 848. This ruling was later reversed by the California Court of Appeal. Petition, Appendix A, 19-21.

On May 6, 1983, Judge Sutter denied petitioners' motion for a new trial on liability but granted petitioners' motion for a new trial on the question of exemplary damages. CT 965-971. Judge Sutter ruled that there was no evidence to support exemplary damages which, of course, was literally true, since no evidence whatsoever had been introduced in the second part of the bifurcated trial.

Jury trial solely on the issue of punitive damages, pursuant to petitioners' successful motion for a new trial on that issue, began on April 21, 1987. II RT 637. On May 13, 1987, the jury returned its verdict in favor of respondents in the amount of $11 million. II RT 2982-2983. On August 14, 1987, Judge Eaton, trial judge at the second exemplary damages jury trial, ruled that the damages were excessive and reduced them by $2.5 million. II RT 2089-2142.

REASONS WHY THE WRIT SHOULD BE DENIED

I

FEDERAL QUESTIONS NOW RAISED BY PETITIONERS WERE NOT RAISED IN THE CALIFORNIA TRIAL COURT OR COURT OF APPEAL

A. Standards Which Petitioners Now Claim Are Vague Are The Very Standards By Which They Asked That The Jury Be Guided.

Though petitioners acknowledge, by omission, that they raised no federal Due Process questions in the trial

court (Petition, 7-8), they do not reveal that they requested, at trial, the very instruction they now claim contained constitutionally impermissible standards creating an "unfettered" jury. Petition, 12. The jury instruction submitted by petitioners is reproduced in Appendix A, *infra*, and, as will be seen, it, according to petitioners, contains language "virtually identical" to the instruction given at trial. Petition, 15 n.16.

Petitioners had no complaint about the jury instruction in the California Court of Appeal. For good reason. They could not, in California, ask for an instruction, receive it, and then challenge it on appeal. Litigants are not permitted to mine the trial with error of their own creation; thus even if the instruction requested by the litigant is legally faulty, no complaint will be heard on appeal. *Lynch v. Birdwell*, 44 Cal.2d 839, 846 (1955); *Jentick v. Pacific Gas and Elec. Co.*, 18 Cal.2d 117, 122 (1941).

It is, in California, error to refuse any relevant instruction that correctly states the law and is not encompassed within some other instruction. Petitioners were free, for example, to request that the jury be given a *Grimshaw* instruction. Had petitioners done so, the jurors would have been instructed to consider the:

> "Severity of threatened harm; degree of reprehensibility of defendant's conduct, profitability of the conduct, wealth of defendant, amount of compensatory damages (whether it was high in relation to injury), cost of litigation, potential criminal sanctions and other civil actions against defendant based on same conduct." *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 819 n.4 (1981).

Petitioners, in their Supplemental Brief, endorse these standards as curing any vagueness they perceive in the statute. Supplement. 3, n.2. That these standards are consistent with this Court's *Pacific Mutual Insurance Co. v. Haslip*, 59 LW 4157 (1991) decision goes without saying;

indeed, they are even satisfactory to the dissent. *Id.* at 4170 (O'Connor, J., dissenting).

The *Grimshaw* standards are part of the gloss of former California Civil Code § 3294. They were announced six years before petitioners submitted proposed jury instructions to the trial court. Petitioners could have had the jury instructed by the very standards they now call satisfactory by simply asking for them. Petitioners did not request *Grimshaw* instructions; instead they requested, and got, the instruction they now call vague. This is the vice of invited error in its most vivid form. No system of review can tolerate a strategy in which a litigant calls for an instruction, receives that instruction and, after the verdict, argues that the instruction it requested was wrong and that a different instruction, never requested, should have been given.

B. Petitioners' Due Process Claim In California's Appellate Courts Was, Because Not Raised At Trial, Confined To A Contention That The Statute Is Facially Unconstitutional.

Claims that California law violate the Due Process Clause of the Fourteenth Amendment must be raised in the trial court (*Kellis v. Ring*, 92 Cal.App.3d 854, 861 (1979)), a rule that this Court has previously acknowledged and respected. See, e.g., *Edelman v. California*, 344 U.S. 357 (1953). Petitioners raised no Due Process question in the trial court at either of the two punitive damages trials.

Having not raised the Due Process question in the trial court, California law foreclosed petitioners from presenting it in the Court of Appeal except to the extent they could narrow any Due Process claim to a purely legal question. California's appellate courts will consider and decide a legal question not raised in the trial court only when the appellant can demonstrate that the issue is

solely one of law that could not conceivably have been illuminated by any further development of the facts surrounding the transactions to which the legal standard is to be applied. *Ward v. Taggart*, 51 Cal.2d 736, 742 (1959); *Panopulos v. Maderis*, 47 Cal.2d 337, 341 (1956). But if the new legal question, and its relevance to the case at hand, may conceivably be illuminated by factual development, then the question is no longer deemed purely legal and the issue may not be raised, for the first time, on appeal. *Bogacki v. Board of Supervisors of Riverside Co.*, 5 Cal.3d 771, 780 (1971); *Parker v. City of Fountain Valley*, 127 Cal.App.3d 99, 117 (1981). In the Reply to Respondents' Request That Stay Pending Review on Certiorari Be Vacated (p. 7), petitioners affirmed that their challenge in the California appellate courts had been confined to a facial challenge, explaining to this Court the nature of their claim in the California courts as follows: "To begin with, it is proper to consider a constitutional question for the first time on appeal where, as here, it raises only issues of law and the public interest is involved."

Petitioners, then, because the question had not been raised in the trial court, were restricted, in the Court of Appeal, to a facial challenge to former California Civil Code § 3294. It is far from clear to us how, strictly as a procedural matter, former § 3294 could be vulnerable to facial challenge for "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the *facts* of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550 (1975). (Emphasis added); see also *United States v. Powell*, 423 U.S. 87, 92-93 (1975); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33, 36 (1963).

In any event, this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip, supra* (1991), leaves no room

for argument that former § 3294 is open to facial challenge. Facial unconstitutionality having been the only issue left to petitioners when they failed to raise a constitutional issue at trial, and facial constitutionality having been removed as an issue by *Pacific Mutual*, petitioners have no federal issue left.

C. Petitioners Did Not Challenge The Ratio Of Exemplary To Compensatory Damages As A Federal Question.

Though petitioners did, in the California courts, challenge the ratio of exemplary damages to compensatory damages as excessive, they did not do so as a *federal* question and they did not, therefore, jurisdictionally preserve it for consideration by this Court. *Beck v. Washington*, 369 U.S. 541, 549-550 (1961).[2]

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[2] Petitioners say that in addition to the imposition of exemplary damages that the imposition of tort liability cannot be squared with Due Process. Petition, p. 26. Petitioners have not, before now, ever claimed that the imposition of liability violated Due Process. No such claim was made in the California courts, trial or appellate, and, accordingly, the Presentation and Decision of the Federal Constitutional Questions (Petition, 7-9) is necessarily devoid of any appropriate citation to the record. As recently as their Reply to Respondent's Request that Stay Pending Review on Certiorari Be Vacated (p. 5), petitioners denied that they were seeking any stay of the liability portion of the judgment. Because petitioners do not even have a colorable (or intelligible) federal claim regarding the liability judgment, we do not intend to respond to this unexplained challenge. Solely to dispense some of the smoke, we make the following observations:

It is not true, as petitioners say, that their conduct was "lawful". Petition, 3. They engaged in an intentional tort and that is not lawful conduct. The contractual arrangements

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II

THE JURY INSTRUCTION WAS NOT CONSTITUTIONALLY INFIRM

The Petition does not tell this Court exactly what the jury instruction was, petitioners preferring, for whatever reasons, to furnish this Court with a truncated version of the standard instruction (Petition, 15 n. 16) rather than the instruction actually given. Likely this inattention to what actually occurred is simply a reflection of petitioners having preserved only a facial constitutional challenge to former California Civil Code § 3294. When a statute is challenged on its face, what in fact occurred is beside the point. Whatever the event, here is the instruction actually given:

> "Plaintiffs have already been awarded damages sufficient to compensate them for any and all legally compensable injuries incurred as a result of Defendants' actions which are the subject of this lawsuit. You are to consider whether or not you should award additional damages against the Defendants, called punitive damages, only for the sake of example and by way of

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between the parties is, under California law, pertinent only to the degree that it supports the defense of justification or privilege and it is a factual question. At the liability trial, petitioners introduced no testimony contending that their conduct was justified or motivated by their contractual arrangements with respondents. Additionally, petitioners stipulated that the jury instruction regarding the standard of intentional interference with business relations was a correct statement of the law. RT 640. At the second exemplary damages trial, the jury was instructed that the contractual arrangements between the parties were lawful agreements. II RT 2073.

punishment. You may in your discretion award such damages, if, but only if, you find that a preponderance of the evidence that said Defendants were guilty of malice or oppression in the conduct on which the prior jury based its finding of liability.

'Malice' means conduct which is intended by the Defendant to cause injury to the Plaintiff or carried on by the Defendant with a conscious disregard for the rights of others. A person acts with conscious disregard of the rights of others when he is aware that his conduct will probably result in a violation of the rights of others and willfully and deliberately fails to avoid that consequence.

'Oppression' means subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.

If you determine that punitive damages should be awarded, the law provides no fixed standards as to the amount of punitive damages you may award, but leaves that amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

The reprehensibility of the conduct of the Defendant;

The amount of punitive damages which will have a deterrent effect on the Defendant in the light of Defendants' financial condition;

That the punitive damages must bear a reasonable relationship to the actual damages.

You have been told and I'll tell you again that the actual damages awarded by the prior jury as compensation for the injuries were as follows – there are three Plaintiffs. That hasn't been clear in this case, but there are three separate Plaintiffs and that will show that on the verdict forms.

> In the prior action the jury awarded Plaintiff Steven K. Hilgedick $42,000. The jury awarded the Plaintiff Pacific Manufacturing Company $426,000; and awarded Plaintiff Hilgedick Rentals $261,682.10; for a total judgment against the Defendants in favor of the three Plaintiffs of $730,482.10.
>
> Now, you have been advised that Plaintiffs have declared bankruptcy. You have been advised that the Defendants have asserted a claim against the Plaintiffs in that bankruptcy proceeding. The validity of the Defendants' claim in the bankruptcy proceeding and the amount of that claim are in dispute and will be decided by the Bankruptcy Court in a proceeding in that court.
>
> As a result, if you find that Plaintiffs are entitled to an award of punitive damages, you are not to consider that Defendants have a claim in Plaintiffs' bankruptcy proceeding in making a decision as to the amount of punitive damages to be awarded. This court will make an appropriate adjustment as required by law to take into consideration Defendants' claim against the Plaintiff in the bankruptcy proceeding. II RT 2074-2076.

By any rational measure, the above-instruction guided the jury with a great deal more precision, or to use petitioners' locution, "fettered" (Petition, 12) the jury, a good deal more than the Alabama instruction at issue in *Pacific Mutual Life Insurance Co. v. Haslip, supra* 4158, n.1. First of all, the above instruction mandates not only that the jury focus its attention on wrongdoing but that the jury make a factual finding that a special form of wrongdoing has occurred *before* turning its attention to damages or exercising any discretion concerning the amount of damages. The jury in the instant case was expressly instructed that exemplary damages could only be

imposed if, in addition to the commission of the intentional tort, the jury should find that petitioners had acted with malice or oppression. Thus "you may in your discretion award such damages, if, but only if, you find that by a preponderance of the evidence that said Defendants were guilty of malice or oppression. . . ." Both malice and oppression were then defined, malice meaning the jury had to find that, in addition to the commission of the intentional tort, petitioners intended to cause injury to respondents or that their conduct was pursued with a conscious disregard of respondents' rights; oppression meaning the jury had to find that in addition to committing the intentional tort, petitioners subjected respondents to cruel and unjust hardship in conscious disregard of respondents' rights. The Alabama instruction, by contrast, permitted imposition of punitive damages, in the jury's total discretion, solely on the basis of the occurrence of the tort with no requirement that the jury, anterior to considering punitive damages, find any additional element or form of wrongdoing.

After defining malice and oppression, the above-instruction again emphasizes that there must be a threshold finding of malice or oppression before any amount of exemplary damages can be considered ("If you determine that punitive damages shall be awarded") and, following that admonition, the jury is told that although there is no precise dollar amount set by law ("the law provides no fixed standards as to the amount of punitive damages you may award") that, as to the amount of exemplary damages, they are to exercise "sound" discretion "without passion or prejudice."

By contrast, the Alabama jury was simply instructed that imposition of exemplary damages was "entirely discretionary" without a distinction even being drawn

between the discretion to impose damages and the discretion to decide the amount of damages. There was no admonition that discretion was to be exercised soundly, dispassionately and without prejudice.

After directing that exemplary damages may be awarded only if the jury first finds oppression or malice and that the jurors are to exercise their discretion soundly, without passion or prejudice, in determining the amount of any damages, the above-instruction tells the jurors that, in arriving at any award of exemplary damages they are, first of all, to focus their attention, once again, on the wrongdoing of petitioners. "The reprehensibility of the conduct" is the first element to be considered. Thus, after the threshold finding of malice or oppression, reprehensibility enters the picture as a measure of damages. Next, the above-instruction tells the jurors that the amount of exemplary damages should be such as will have a deterrent effect on petitioners in light of their financial condition. Finally, the jury is told that the punitive damages must bear a reasonable relationship to the compensable damages and, in order to reemphasize that point, the instruction reiterates the amount of damages assessed on liability ("You have been told and I will tell you again"). By contrast, the Alabama instruction mentioned reprehensibility not at all but rather the "character and degree of the wrong" and did not expressly mention deterrence but only the "necessity of preventing similar wrong." The Alabama instruction does not direct attention to the defendant's financial condition and it does not direct the jury to consider the relationship of any exemplary damages it may award to the compensable damages.[3]

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[3] Although the Alabama jury was not directed to consider the financial condition of the defendant, it is apparently a

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In sum, the above-instruction includes every element of the Alabama instruction, but with greater precision and emphasis and with greater restraints on the exercise of discretion. The above-instruction, moreover, contains additional guidelines including a threshold factual finding of wrongdoing (malice or oppression) before a jury may even consider, much less exercise, discretion regarding an amount of exemplary damages; and, unlike Alabama, the above-instruction required that the exemplary damages bear a reasonable relationship to the compensatory damages.

III

THE RELATIONSHIP OF EXEMPLARY TO PUNITIVE DAMAGES IS REASONABLE AND WAS THOROUGHLY CONSIDERED AND REVIEWED PURSUANT TO STANDARDS WHICH PETITIONERS REQUESTED

Petitioners' Supplemental Brief tells us that exemplary damages awards should pass constitutional muster only where appellate review is available pursuant to

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matter to be considered on appellate review when damages are challenged as excessive. See *Pacific Mutual*, at 4162. In California, consideration of evidence on appeal is restricted to the record at trial and thus, absent trial evidence of financial position it would be impossible for an appellate court to assess financial position. Petitioners, in their Supplemental Brief, tout appellate consideration of financial position as a virtue that should be constitutionally required. Supplement, 3, n.2. Petitioners did, in fact, receive that appellate consideration and it was possible only because financial position evidence was introduced at trial.

"Detailed substantive standards." Supplement, 3. Petitioners then reveal the detailed substantive standards they have in mind:

> The Alabama Supreme Court first announced these standards in *Green Oil Co. v. Hornsby*, 539 So.2d 218, 224-225 (Ala. 1989). There, the court directed courts to consider the following factors in reviewing the awards of punitive damages: (a) the relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the defendant's "financial position"; (e) the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, also to be taken in mitigation." Supplement, 3 n.2.

That the standards are cribbed from this Court's *Pacific Mutual* (at 4162) decision, where they are not featured as a constitutional model, in no way diminishes their value to respondents who have, until the Supplemental Brief, had nothing with which to grapple but petitioners' belated claim that there are some phantom "standards" unrecognized by California. Finally there is something to contest. And, it turns out, a contest is unnecessary. These "detailed substantive standards" do not have their provenance in 1989 Alabama, but 1981 California. To Californians, they have become as familiar as an old shoe; we call them *Grimshaw* standards. In *Grimshaw v. Ford Motor Co., supra* at 819, n.14 (1981), the

Court of Appeal, in sustaining an exemplary damages award of $3.5 million dollars, held that "the amount of the award as reduced by the judge was reasonable under the suggested factors, including the factor of any other potential liabilities, civil or criminal." The "suggested factors" by which the review had been conducted were:

> "Severity of threatened harm; degree of reprehensibility of defendant's conduct, profitability of the conduct, wealth of defendant, amount of compensatory damages (whether it was high in relation to injury), cost of litigation, potential criminal sanctions and other civil actions against defendant based on same conduct."

If petitioners did not receive *Grimshaw* review it is because petitioners did not request *Grimshaw* review. All that was required of petitioners, in California's appellate courts, was that they request *Grimshaw* review and indicate, by appropriate reference to the record, in what way the judgment should be deemed unreasonable pursuant to *Grimshaw* standards. Petitioners did not do that. The truth is that petitioners have never, at any time, asked for any review, from any court, that would focus on the material facts of this case. Petitioners, in the trial court, following verdict; in the California Court of Appeal; in their petition to the California Supreme Court; and in their Petition and Supplemental Brief here have really had but one point: that the exemplary damages do not bear a reasonable relationship to the compensatory damages and that, as a matter of law, quite apart from the facts of the case, an 11 to 1 ratio violates some unspecified (natural law?) standard. Petition, 24; Supplement, 6.

The relationship, in this case, of the exemplary damages to the compensatory damages has been considered at the state level on four separate occasions. First of all

the jury, which imposed the exemplary damages, considered the relationship to compensable damages. The jury was instructed that any exemplary damages it might impose must bear a reasonable relationship to the compensatory damages and the jurors, moreover, were expressly reminded as to the amount of compensable damages. After the jury verdict, petitioners argued to the trial judge that the exemplary damages did not bear a reasonable relationship to the compensable damages. The trial judge, who had the advantage of having heard all the evidence in the case, thoroughly reviewed petitioners' contention and did, indeed, reduce the verdict by $2.5 million. The trial judge did so based on a theory which petitioners had not advanced. II RT 2129. It is difficult to imagine a stronger demonstration of just how thorough and dispassionate a review petitioners have had from the California judiciary. Following the trial judge's review of the jury's consideration, petitioners argued, in the Court of Appeal, that the exemplary damages, as reduced by the trial judge, were not reasonably related to the compensatory damages. After thorough review, the Court of Appeal issued a 70 page opinion in which the justices unanimously concluded that the exemplary damages bore a reasonable relationship to the compensatory damages. Petitioners then asked the California Supreme Court to hear the case and find that the relationship of exemplary to compensatory damages was not reasonable and, after review, not one justice of the California Supreme Court voted to hear petitioners' case. Now, how much review of the damages-relationship issue are petitioners supposed to receive? Four separate considerations would seem ample.

Whether exemplary damages bear a reasonable relationship to compensatory damages is not a question of mathematics. The reasonableness of the relationship turns

on the facts of the case. In some cases a ratio of 2 to 1 will be unreasonable; in other cases a ratio of 100 to 1 will be reasonable. All the compensatory damages sustained by petitioners were out-of-pocket and the 11 to 1 ratio is, compared with the 200 to 1 ratio sustained by this court in *Pacific Mutual* (at 2163), rather modest. In determining whether the relationship is reasonable, moreover, California Courts examine all injury actually inflicted by the wrongdoer.

The amount of exemplary damages awarded in the instant case is, in truth, less than the actual injury inflicted by petitioners. Compensatory damages, in California, are a very austere matter, severely restricted by considerations such as standing and immediacy. These restrictions do not, however, control analysis when exemplary damages are challenged as excessive. In that situation, the California Courts look to the complete and actual losses of the victim. See, e.g., *Neal v. Farmers Ins.*, 21 Cal.3d 910, 929 (1978); *Pusateri v. E.F. Hutton Co., Inc.*, 180 Cal.App.3d 247, 249-50 (1986).

The injury suffered individually by respondent Steve Hilgedick is good illustration of the point. Hilgedick, as an individual, recovered compensatory damages in the amount of $42,000, which represented the rent that petitioners prohibited Pacific Trencher from paying to Hilgedick. Only $42,000 was directly attributable to the tort of intentional interference. But the injury inflicted by petitioners' malicious course of conduct greatly exceeded $42,000. Hilgedick, at the time the scheme to destroy him began, had a personal worth of about $4.5 million (II RT 915) and Pacific Trencher, additionally, owed him $450,000. RT 544. But for the conduct of petitioners, none of this nearly $5 million would have been lost.

There is also Pacific Trencher to consider. Pacific Trencher, the year before petitioners began to exercise

control over it, grossed nearly $11 million (RT 105) and provided the community with over 100 jobs. RT 82; II RT 787. Petitioners, as part of their scheme to destroy Hilgedick, took over Pacific Trencher and, at the time it was plunged into bankruptcy, petitioners, not respondents, had control of the Pacific Trencher stock. Under California law, therefore, respondents had no standing to assert this grievous loss to them personally as well as their community. But there is no constitutional reason why California's standing laws could not be different and there is, therefore, no constitutional reason why, when reviewing the appropriateness of the exemplary damages, the California courts cannot take into account this damage actually inflicted by petitioners in their malicious course.

And there is also the actual loss to respondent Pacific Manufacturing which, at the time petitioners began their destructive scheme, looked to be an even more promising business than Pacific Trencher. Because of petitioners' interference, Pacific Manufacturing lost a Navy contract, on which it was low-bidder, worth $7.7 million. II RT 863. Shortly thereafter Pacific Manufacturing was again low-bidder, on a $10 million contract, but did not get it. II RT 918. Instead, because of petitioners' interference, Pacific Manufacturing closed its doors and went out of business. II RT 924. Pursuant to California's compensatory damages law, these multi-million dollar losses were deemed too speculative to permit recovery as intentional interference damages. But there could be no constitutional impediment to California modifying its standards as to what damages are sufficiently certain to justify recovery and there cannot, therefore, be any constitutional impediment to including these sums in the exemplary damages calculus. There is more, including the destruction of Hilgedick Rental, which had been grossing $1 million a

year (RT 85), but it boils down to this: the exemplary damages do not come close to matching the actual damage inflicted.

And why did petitioners inflict all this damage? For no reason except to cover their own tracks when, through their own negligence, they lost their security interest in the assets of Pacific Trencher. And petitioners maintained this malicious course over a six-month period, all the while deluding Hilgedick into selling more than $1.5 million of their product. II RT 883.

There is nothing unreasonable about the amount of exemplary damages imposed on petitioners.

CONCLUSION

Petitioners requested the jury instruction they now question and did not raise the ratio of exemplary to compensatory damages as a federal question in the California courts; their Petition is, therefore, jurisdictionally infirm. And petitioners' constitutional objections, even were they cognizable, are meritless.

Respondents respectfully urge that the Petition be denied and the stay vacated.

Dated: March 29, 1991

Respectfully submitted,

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APPENDIX

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 17

(Measure of Punitive Damages)

The law provides no fixed standards as to the amount of punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

(1) The reprehensibility of the conduct of the defendant,

(2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition,

(3) That the punitive damages must bear a reasonable relation to the actual damages.

If you find that plaintiff is entitled to an award of punitive damages against defendant, you shall state the amount of punitive damages separately in your verdict.

Given ___

Refused ___

Given as modified ___

Withdrawn ___

_____

Judge of the Superior Court

Based on the last three paragraphs of California Jury Instructions (BAJI) (7th Ed. 1986) No. 14.71, which address the measure of punitive damages.